Filed 2/10/09 In re J.A. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re J.A., JR., a Person Coming Under the Juvenile Court Law.	B208308 (Los Angeles County Super. Ct. No. CK19280)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. J.A., et al., Defendants and Appellants.	

APPEAL from an order of the Superior Court of Los Angeles County, Sherri Sobel, Juvenile Court Referee. Affirmed.

Michael A. Salazar, under appointment by the Court of Appeal, for Defendant and Appellant, J.A.

Catherine C. Czar, under appointment by the Court of Appeal, for Defendant and Appellant, S.C.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, and Byron G. Shibata, Associate County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Both parents appeal from the order terminating parental rights to their Indian child. Father contends that the evidence was insufficient due to the lack of recent Indian expert testimony. Father also contends that the juvenile court abdicated its duty to apply a statutory exception to the preference in the law for adoption. Mother joins in father's arguments without claiming independent error. We reject father's contentions and affirm the order.

BACKGROUND

1. *Detention and Tribal Intervention*

J.A., Jr. came to the attention of the Department of Children and Family Services (Department or DCFS) in December 2006, when he was approximately six weeks old, after the Department was informed that mother had been seen screaming at the baby, forcing his bottle on him, and kicking his stroller. Mother and father entered into a voluntary family maintenance agreement under which J.A., Jr. remained in his parents' custody, and the Department provided family preservation services. The services were to include counseling for mother, in-home counseling, and parenting classes. As mother had a history of substance abuse, parents agreed to drug tests on demand. In addition, as mother suffered from a seizure disorder for which she had been prescribed Dilantin, she agreed to participate in a complete medical evaluation.

In March 2007, the Department detained J.A., Jr. and filed a petition to bring him within the jurisdiction of the juvenile court, pursuant to Welfare and

Institutions Code section 300.[1] The Department reported to the court that mother had submitted a diluted test on one occasion, and later tested positive for amphetamine. The DCFS social worker (CSW) had determined that mother's three other children, by fathers other than J.A., Jr.'s father, had been detained and she had failed to reunify with them. Mother's parental rights had been terminated as to two of the other children in 1998 and 1999. The third was living with her father.

On March 5, 2007, the juvenile court ordered J.A., Jr. detained in DCFS custody. As father had stated he was a registered member of the Confederated Salish and Kootenai Tribes of the Flathead Reservation (Tribe), the court ordered the Department to give notice to the Tribe and the Bureau of Indian Affairs, as required by the Indian Child Welfare Act (ICWA) 25 U.S.C. § 1901 et seq.[2] The court ordered monitored visits for mother, father, paternal grandmother, and paternal aunt and uncle. The parents were ordered to continue drug treatment with random testing, and mother was ordered to submit to a psychological evaluation. The Department was ordered to provide family reunification services to both parents. Paternal grandmother, a member of the Tribe, expressed a desire for custody.

Prior to the jurisdiction/disposition hearing, the Tribe filed a notice of intervention, but did not request a transfer of jurisdiction to the tribal court. The court granted the motion to intervene, and the Tribe thereafter participated in the proceedings.

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[1] All further statutory references are to the Welfare and Institutions Code, unless otherwise stated.

[2] See 25 U.S.C. § 1912(a).

On March 26, 2007, mother again tested positive for amphetamine. Mother failed to appear for her psychological evaluation that had been scheduled for April 10, 2007.

2. *Jurisdiction and Disposition*

On April 27, 2007, the parents submitted to the jurisdiction of the court. The court sustained counts b1 and b2 of the amended dependency petition, and declared J.A., Jr. a dependent of the juvenile court.[3]

At the April 27, 2007 hearing, the court received the DCFS reports and the declaration of Indian expert witness, Philip E. Powers.[4] Powers reported that parents had not yet enrolled in court-ordered programs or "involved themselves in verifiable services," but were visiting the child on the weekends. Mother had not yet submitted to a medical evaluation for her seizure disorder. Based upon his review of the DCFS case files and interviews with the CSW and tribal social

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[3] As amended, the sustained counts alleged:

"b-1 [¶] The child['s] mother . . . has an extensive history of substance abuse and is a current abuser of amphetamine and methamphetamine, which limits the mother['s] ability to provide the child with regular care and supervision. The child's siblings . . . receive permanent placement services due to the mother's substance abuse. The mother's abuse of illicit drugs endangers the child's safety, and places the child at risk of harm.

"b-2 [¶] The child['s] father . . . has a history of substance abuse, which limits the father['s] ability to provide the child with regular care and supervision. The father's history of substance abuse endangers the child's safety and places the child at risk of harm."

[4] Under ICWA, "[n]o foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." (25 U.S.C. § 1912(e).)

worker, Powers was of the opinion that "Active Efforts [had] been made to provide remedial and rehabilitative services to the parents to prevent the breakup of this Indian Family, and that these efforts [had] proven unsuccessful." Powers noted that mother had recently tested positive for illicit substances, that father had a history of drug use and a criminal history involving drugs, although he had completed a drug program.[5] He concluded that returning J.A., Jr. to the parents' custody would cause a danger of serious physical and emotional harm to the child, and that J.A., Jr. should remain in the custody and care of the Department. Because the parents were still married and living together, Powers recommended that the court continue to order reunification services for both parents.

The court found that active efforts had been made to prevent J.A., Jr.'s removal from his Indian home, but that the efforts had been unsuccessful. The court found that reasonable services had been provided, but the child could not be safely returned to the parents. The court ordered the removal of J.A., Jr. from the custody of his parents and placed in the care of the Department for suitable placement. The court ordered both parents to participate in individual counseling, as well as a parenting program. Mother was to participate in drug counseling and submit to random drug testing, and father was to continue to attend his aftercare drug program, until he provided 12 clean, consecutive, random drug tests. If he failed to do so, he was to show enrollment in a drug treatment program. Visits were to continue to be monitored.

On June 11, 2007, the Department stated in a supplemental progress report that mother had enrolled in an inpatient drug treatment program, but left before

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[5] Father had been convicted of possession of a controlled substance, burglary, vehicle theft, and other offenses in 1993 and 1998. He completed a drug treatment program through Walden House in 2005, and stated to the CSW that he had been sober since that time, and still attended meetings.

completing it. She had not enrolled in other court-ordered programs. Father had enrolled in a parenting course and was on a waiting list for individual counseling. He had submitted to three drug tests with negative results. The Department also reported that an ICPC (Interstate Compact on the Placement of Children) had been prepared in order to allow placing J.A., Jr. with his paternal grandmother in Utah. The court received the report and gave the Department discretion to place J.A., Jr. in the home of his paternal grandmother, which it did in July 2007.

3. *Six-month Review and Termination of Reunification Services*

The six-month review hearing was scheduled for October 26, 2007. The court received the Department's report and continued the review hearing to November 16, 2007, for a contested hearing pursuant to section 366.21, subdivision (e).[6] All other orders were to remain in effect. The parents did not appear for the contested hearing. The only evidence before the court was the DCFS reports of October 26, 2007, and November 16, 2007.

In the October report, the Department stated that mother had not participated in individual counseling, drug counseling, or parenting classes. Six random drug tests had been scheduled for mother, but she failed to show for four of them. The remaining two were negative. Mother had attempted suicide twice after arguments with father, and had been hospitalized in early October after the second attempt.

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[6] Section 366.21, subdivision (e), provides in substantive part: "At the review hearing held six months after the initial dispositional hearing, the court shall order the return of the child to the physical custody of his or her parent or legal guardian unless the court finds, by a preponderance of the evidence, that the return of the child to his or her parent or legal guardian would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child. . . . [¶] . . . [¶] If the child was under three years of age on the date of the initial removal, . . . and the court finds by clear and convincing evidence that the parent failed to participate regularly and make substantive progress in a court-ordered treatment plan, the court may schedule a hearing [to determine whether to terminate parental rights]."

She was diagnosed with bipolar disorder with psychotic features, in addition to her seizure disorder. The CSW was unable to find bed space at an inpatient psychiatric treatment facility, and she was released to a drug treatment center. Seven random tests were scheduled for father. He failed to show five times, and one test was positive for amphetamine. When father told the CSW that he had missed tests because the testing site was too far from work, the CSW found a site close to father's home, but still he failed to show. Father had been participating in individual counseling, but had rescheduled several appointments. He had completed a parenting course, but had not yet enrolled in a drug treatment program. Mother had had no contact with J.A., Jr. for six months, but father regularly telephoned him once a week. The Department reported that the paternal grandparents wished to adopt J.A., Jr.

In November, the Department reported that mother had placed her life in danger a third time on November 6, 2007, when she ran into the street and remained there until police and firefighters arrived. The CSW had no other new information regarding mother, as she had been unable to reach mother despite several attempts. The Department reported that father had again failed to show for a random drug test. In the meantime, J.A., Jr. was doing well in the care of his paternal grandparents. The Department recommended that the court terminate reunification services and schedule a hearing to terminate parental rights and select adoption as the permanent plan, pursuant to section 366.26.

The court heard the arguments of counsel. Mother's counsel argued that reunification services should be continued, during which she should be provided a mental health treatment program specific to her needs. Father's counsel represented that in addition to completing a parenting course and attending Al-Anon and Narcotics Anonymous classes, father had enrolled in a drug program, he was no longer living with mother, and the reason he had missed tests was due to

his work schedule, which required him to travel throughout the county. The minor's counsel asked that services be terminated for both parents. She noted that mother had done nothing to comply with the case plan, and although father had partially complied and remained involved, he had not enrolled in a drug program, and had failed to submit to random tests.

The court found by a preponderance of the evidence that J.A., Jr. could not be returned home. The court explained that mother had done nothing, and was in no condition to have custody of her child. The court noted that there was no evidence to support any of the representations by father's counsel, and found that father was still with mother, and had not enrolled in a treatment program. The court rejected father's excuses for failing to submit to drug tests as not supported by the evidence, and found that his attendance at individual counseling had been sporadic. The court found that active but unsuccessful efforts had been provided to prevent or eliminate the breakup of this Indian family, and that no statutory exception was applicable.

At the November 16, 2007 hearing, the court terminated reunification services and scheduled a section 366.26 hearing for March 14, 2008. The court ordered the Department to provide an "expert letter" at that time. The same day, father filed a notice of intent to file a writ petition. However, no petition was filed and the case was closed.

4. *Termination of Parental rights*

On March 14, 2008, the court called the section 366.26 hearing and received into evidence the Department's report of the same date. The parents did not appear, and their attorneys requested the court schedule a contested hearing. The court granted the request and continued the matter to April 3, 2008. The parents did not appear on April 3, but their counsel presented argument to the court, requesting the court to order guardianship as the long-term plan.

At the April 3 hearing, the court received and considered the Department's interim review report filed that date. The CSW reported that the parents were living on the Tribe's reservation in Montana. Father had telephoned the CSW to report that he planned to start counseling at a county program, and that although mother had not enrolled in any programs, both parents were drug-free.

The court also considered the tribal letter submitted by the Department on March 14, 2008. The Tribe's attorney and ICWA representative wrote that the Tribe approved of the permanent plan of adoption by the paternal grandparents.

The court found that there was an "expert letter" in the court's file, that the child was in an appropriate ICWA placement, and that the Tribe was in agreement with adoption by the paternal grandparents. The court found by clear and convincing evidence that J.A., Jr. was adoptable, and that there were no exceptions. As required by ICWA, the court found that active efforts had been provided to prevent or eliminate the breakup of the Indian family, and found beyond a reasonable doubt that returning the child to the parents would likely cause serious physical and emotional damage to the child. (See 25 U.S.C. § 1912(f).) The court terminated parental rights as to both parents. Mother and father timely filed separate notices of appeal from the order terminating parental rights.

DISCUSSION

1. *Contentions*

Father contends that, due to the absence of a recent Indian expert declaration, insufficient evidence supported the juvenile court's finding -- required by Title 25 United States Code section 1912(f) prior to terminating parental rights -- that parental custody would create a substantial risk of detriment to the safety, protection, or physical and emotional well-being of J.A., Jr. Father also contends that the juvenile court erred in deferring to the Tribe's preference for

adoption, and "abdicated its duty to apply the less severe options of section 366.26, (c)(1) . . ." (the statutory exceptions to termination of parental rights).

Mother joins in father's arguments and cites the rule that where both parents appeal the termination of their parental rights, reversal as to one parent requires reversal as to the other. (Cal. Rules of Court, rule 5.725(a)(2); *In re Mary G.* (2007) 151 Cal.App.4th 184, 208.) She assigns no independent error pertaining to the termination of her parental rights.

2. *Standard of Review*

We review the court's findings made pursuant to ICWA for substantial evidence. (*In re Michael G.* (1998) 63 Cal.App.4th 700, 715.) We review the record in a light most favorable to the order and uphold the finding unless it can be said that no rational factfinder could reach the same conclusion. (*Id.* at pp. 715-716.) The party challenging the order bears the burden of showing there is no evidence of a sufficiently substantial nature to support the court's finding or order. (*In re Barbara R.* (2006) 137 Cal.App.4th 941, 950.)

A challenge to a juvenile court's order terminating parental rights and refusing to apply a statutory exception is reviewed for abuse of discretion. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.) "[W]hen a court has made a custody determination in a dependency proceeding, '"a reviewing court will not disturb that decision unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination [citations]"' [Citations.]" (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.) "'The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.' [Citations.]" (*Id.* at pp. 318-319.) "'[E]valuating the factual basis for an exercise of discretion is similar to analyzing the sufficiency of the evidence

for the ruling. . . . Broad deference must be shown to the trial judge. The reviewing court should interfere only "'if [it] find[s] that under all the evidence, viewed most favorably in support of the trial court's action, no judge could reasonably have made the order that [he or she] did.'"' [Citations.]" (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351.)

3. *Expert Testimony*

Under the provisions of ICWA, "[n]o termination of parental rights may be ordered . . . in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." (25 U.S.C. § 1912(f); see also § 224.6; Cal. Rules of Court, rule 5.485; *In re Brandon T.* (2008) 164 Cal.App.4th 1400, 1412.)[7]

Father acknowledges that the declaration of Indian expert witness Powers had been admitted at the April 27, 2007 disposition hearing, and that Powers opined that returning J.A., Jr. to the parents' custody would cause a danger of serious physical and emotional harm to the child. Father suggests that because the finding of risk to the child was made by clear and convincing evidence (see § 361, subd. (c)(6)), the court erred in considering the same declaration in making the risk determination beyond a reasonable doubt at the section 366.26 hearing at which it terminated parental rights.

Father's argument necessarily presupposes that the law requires a risk of detriment finding to be based solely upon the Indian expert's opinion. It does not.

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[7] Father does not assign the form of the testimony as error on appeal. In the trial court, father did not object to the admission of the declaration of Indian expert witness Powers in lieu of testimony; nor did he appeal from the disposition order made at the hearing in which it was admitted.

Title 25 of the United States Code, section 1912(f) requires the court to make its finding beyond a reasonable doubt from evidence that *includes* expert testimony. Thus, the question is not, as father's argument suggests, whether the expert's declaration proves danger to the child beyond a reasonable doubt, but whether *all the evidence* supports the court's finding. The finding by clear and convincing evidence was based on the declaration and the evidence presented prior to April 27, 2007; the finding beyond a reasonable doubt was based on the declaration and the evidence presented after that date. Father's argument ignores a year of evidence.

Further, an Indian expert's opinion based upon the circumstances existing at the time of a prior hearing retains its evidentiary value in a later hearing, so long as there has been no substantial change in circumstances. (See *In re Barbara R.*, *supra*, 137 Cal.App.4th at p. 950 [11-month interval; parent must show change in circumstances rendering the evidence stale].) The circumstances upon which Powers relied consisted of the parents' failure to enroll in court-ordered programs or to have "involved themselves in verifiable services," despite the provision of remedial and rehabilitative services, and father's history of drug use. Father suggests that the declaration was insufficient because there was no updated review of the Department's efforts to provide services or the degree to which the parents complied with the reunification plan.[8] An updated review would not have shown a

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[8] Title 25 United States Code section 1912(d) requires the court to be satisfied that active efforts to provide remedial services and rehabilitative programs have been made prior to placing the minor in foster care. Similarly, California law requires evidence of such efforts prior to terminating parental rights. (§ 361.7, subd. (a).) However, neither the federal statute nor the California statute requires expert testimony on this issue, or proof beyond a reasonable doubt. Here, the Department presented ample evidence that the CSW referred the parents to rehabilitation services and followed up on them. Further, when father missed drug tests, the CSW found a testing center close to his home.

change in circumstances sufficient to render Powers's opinion stale. The evidence of compliance with the case plan showed, as the court noted in the November 16, 2007 hearing, that mother had "done absolutely nothing." Father's compliance was insubstantial, consisting of the completion of a parenting course and participation in sporadic individual counseling.

Father has thus failed to show changed circumstances such that Powers's declaration was stale at the time of the section 366.36 hearing. (See *In re Barbara R.*, *supra*, 137 Cal.App.4th at p. 950.) Indeed, father's circumstances changed for the worse when father failed to show for five random drug tests, tested positive for amphetamine, and failed to enroll in a drug treatment program. We conclude that sufficient evidence supports the court's finding beyond a reasonable doubt that continued parental custody would present a substantial risk of serious physical and emotional damage to the child. Further, because substantial evidence supports the court's finding, had the absence of an updated declaration been error, it would be harmless. (*Id*. at p. 951.)

4. *The Court's Finding that No Exceptions Applied*

Father contends that the court erroneously deferred to the Tribe's support for J.A., Jr.'s adoption by his paternal grandparents. He suggests that the court would have chosen guardianship, rather than adoption, as the permanent plan, and thus it would not have terminated parental rights, but for its mistaken belief that it had no choice but to follow the Tribe's recommendation. Father bases his contention on the following comment made by the court at the April 3, 2008 hearing: "The child is in an appropriate ICWA placement. The Tribe's in agreement with the adoption in this family. If the Tribe had not been in agreement, I probably would have gone to a legal guardianship[,] but the Tribe is in agreement with this[,] so that particular exception will not apply." The court did not explain which exception it found inapplicable, but as father surmises, it appears to have been the Indian child

exception found in section 366.26, subdivision (c)(1)(B)(vi)(II). That section provides that when the juvenile court finds the child adoptable, it must terminate parental rights, unless it finds a "compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: . . .

> "(vi) The child is an Indian child and there is a compelling reason for determining that termination of parental rights would not be in the best interest of the child, including, but not limited to:
>
> "[¶] . . . [¶]
> "(II) The child's tribe has identified guardianship, long-term foster care with a fit and willing relative, or another planned permanent living arrangement for the child." (§ 366.26, subd. (c)(1)(B)(vi)(II).)

Father construes the court's statement that it would have "gone to a legal guardianship" had the Tribe not agreed to adoption, as reflecting the court's belief that "it could not select a plan contrary to the Tribe's wishes." We disagree. It is more likely that the court was responding to the parents' request that it consider guardianship, by explaining not that it was bound by the Tribe's preference, but that it was unnecessary to consider any exception, as the Tribe had not identified guardianship or long-term foster care for the child. An order is presumed correct, all intendments and presumptions are indulged in its favor, and ambiguities are resolved in favor of affirmance. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *In re S.C.* (2006) 138 Cal.App.4th 396, 408.) Because father's interpretation draws unfavorable inferences, presumes error and is based on unsupported speculation, we reject it.

Moreover, as respondent notes, by the time of the section 366.26 hearing, adoption was the presumed plan; legal guardianship could be ordered only if an applicable exception existed. The Tribe did not identify a guardianship or long-term foster care alternative, and the parents did not argue that any exception

applied. The comments of the trial court did no more than demonstrate the court's awareness of a potential exception which -- under the circumstances of this case -- did not apply. We find no error.

DISPOSITION

The order terminating parental rights is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.